

Some Early Observations on an Experiment with Mandatory Mediation

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I. INTRODUCTION

Advocates of Alternative Dispute Resolution (ADR) disagree about many things, but they are virtually unanimous that the litigation system is in serious need of reform. It is too slow, too expensive, too cumbersome, too lawyer-dominated, too inaccessible, too mystified, and too regimented. Alternative dispute resolution, particularly as typified by mediation, promises to be more efficient, more humane, more empowering, and more creative. To be sure, conventional dispute resolution has its defenders,¹ but no participant or observer of the judicial system can deny that efficiency, humanity, empowerment, and creativity are qualities that are in notably short supply in most American courtrooms.

Like solar power or gasohol, alternative dispute resolution is simply too good an idea to pass up. It is a concept that demands fair experimentation. If mediation can deliver even a fraction of its perceived potential, it is an idea whose time has arrived. Moreover, it is an idea with relatively little negative potential. Since mediated solutions are voluntary by definition, the principal risk in experimenting with mediation is some amount of wasted time and energy. Measured against the possibility of streamlining and improving the resolution system, that is very little risk indeed.

To date, much of the experimentation with ADR has been private in nature. Private, not-for-profit neighborhood justice centers have been established in a number of cities; they deal primarily with small claims and personal disputes, which are often referred by local municipal courts. At the other end of the disputing spectrum, large institutions have experimented with purportedly cost efficient methods such as mini-trials and rent-a-judge programs. What unifies these disparate approaches to ADR is that they all depend upon party initiative. Mini-trials do not happen, and judges are not rented, unless the litigants agree between themselves to attempt alternative dispute resolution. Even in the case

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1. See, e.g., Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Terrell, *Rights and Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution*, 36 EMORY L.J. 541 (1987).

of referrals from small claims courts, mediation does not occur unless the parties willingly participate—and that usually requires that they make and keep appointments at a Neighborhood Justice Center or similar outpost.² As important as these experiments are, they ultimately tell us very little about the potential for ADR to displace some significant portion of in-court litigation.

The State of Florida, however, has recently undertaken a far bolder experiment. In 1987, the Florida legislature enacted the nation's most comprehensive ADR statute.³ The Florida act defines mediation and, with certain exceptions, provides that courts may refer all or any part of a contested lawsuit to mandatory mediation.⁴ At least in theory, the entire Florida civil justice system has established ADR as an ordinary and available aspect of the pretrial process.

II. MEDIATION IN A JUDICIAL ENVIRONMENT

I became aware of the Florida experiment when I was invited to participate in a workshop in Tallahassee, Florida entitled "Mediation in a Judicial Environment." Jointly sponsored by The Florida State University Center for Dispute Resolution and the National Institute for Dispute Resolution, the purposes of the workshop were at once both local and global in scope. On a purely local level, the program was convened to discuss and brainstorm forms of implementation of the sweeping new mediation statute. More broadly, the conferees were asked to reflect upon the future of the mediation movement, particularly as it will be affected by the advent of court-annexed programs.

The attendees were chosen for their diverse backgrounds; they included mediators, lawyers, court administrators, judges, professors, and others. My assignment was to provide an evaluative analysis. As a nonmediator, nonplayer in the ADR world, I was asked to observe the proceedings, comment upon the various proposals, and provide assistance in unpacking the inevitable assumptions.

In the course of observing the workshop, it became apparent to me that the local and global aspects of the discussion were inseparable. The Florida Mediation Act is far from self-implementing, and it will require the effort, assistance, and understanding of the nation's trained mediators if it is to achieve any measure of practical success. Conversely, mediation professionals, or at least those who wish to enter the main-

2. Regarding the potential for subtle or overt coercion in these circumstances, see Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

3. FLA. STAT. § 44.301-306 (1987). Comparable statutes have been enacted in other states. See TEX. CIV. PRAC. & REM. CODE ANN. § 20.

4. FLA. STAT. § 44.301-302 (1987).

stream, must recognize that Florida's statutory approach may well presage the future of alternative dispute resolution.

The current literature on mediation and ADR essentially stresses the virtue and mechanics of alternative resolution.⁵ Although much has been said about the use of mediation as an alternative to litigation, relatively little has been written about the actual incorporation of ADR as a required procedural aspect of the civil justice system.⁶ The Florida State University workshop, however, was presented with precisely that question. Because the conferees included many of the nation's most prominent ADR proponents and activists, their approach to mandatory mediation will be extremely instructive on the future of court-annexed alternative dispute resolution. What front-line mediators have to say about mandatory mediation will tell us much about whether alternative dispute resolution will be able to cope with institutionalized success.

It is most notable, then, that the workshop was characterized by what might be called a mediator-centric point of view. While the topic of mediation in a judicial setting would seem to call for at least roughly equal treatment of the problems or concerns of mediators and adjudicators (not to mention advocates and parties), most of the actual discussion revolved around the mediator/mediation side of the equation. This was remarkable for several reasons, not the least of which was the presence at the workshop of many judges and lawyers. Nonetheless, their concerns tended to be given less attention, perhaps because the attending mediators were viewed as the relevant experts.⁷

Mediator-centrism does not characterize every aspect of the workshop, but it was definitely a dominant theme that recurred in a variety of

5. See, e.g., Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. FLA. L. REV. 19 (1985); Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986); Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

6. See Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 426-27 (1982) (statistics on the voluntary and coercive use of mediation show much higher use of mediation when it is mandatory); Silberman & Schepard, *Court-Ordered Mediation in Family Disputes: The New York Proposal*, 14 N.Y.U. REV. L. & SOC. CHANGE 741, 746 (1986) (court-ordered mediation may be helpful in convincing initially resistant parties that compromises and cooperation are useful in resolving differences); Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985); Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893.

7. The deference given to the expertise of mediators was interesting, if not ironic, given the emphasis that the ADR movement often places on demystifying and de-expertising the world of disputing. See, e.g., Greason, *Humanists as Mediators: An Experiment in the Courts of Maine*, 66 A.B.A. J. 576 (1980) (discussing the informal and humanistic approach to ADR used by the courts in Maine).

contexts. I will organize the balance of this paper around two basic concepts essential to court-annexed mediation, integrating my own views with what I perceived to be the regnant ideas of the workshop attendees. First, I will discuss the problem of case suitability and selection, and then I will turn to the issue of mediator training and qualifications. While these topics do not at all exhaust the issues inherent in mandatory mediation, they do provide a useful and substantial context within which to examine many of the problems facing institutionalized alternative dispute resolution.

III. CASE SUITABILITY AND SELECTION

The Florida mediation statute allows trial court judges to refer virtually any civil matter to mediation, with only slight exceptions. Apart from defining "mediation" in vague terms, the statute is otherwise maddeningly imprecise. It neither requires that all qualifying cases be referred, nor does it provide guidelines for referral. Instead, that task is left to the chief judges of the various judicial circuits. Thus, from the point of view of judges, litigants, and lawyers, a crucial question for analysis at the workshop should have been "which cases will go to mediation?" But this subject essentially received only interstitial attention. Indeed, even the short presentations that were officially devoted to "judicial standards" discussed case selection only in passing.

In many ways, however, case selection is the primary issue confronting court-annexed mediation. It is virtually impossible to address any other relevant query without knowing which cases will be sent to mediation, or at least what standards will be used to decide this. Will only small cases be mediated or only large ones? Will mediation apply to multi-party cases as well as to two party disputes? How will matters involving institutional litigants be handled? Will the courts do their sorting according to case classification, or will attention be paid to individual case characteristics?⁸

The above are only some of the "pure" selection questions. There are related "process" questions as well: How will courts handle remittal of mediation? May a single party peremptorily veto referral to mediation?

8. These issues have received some attention in the literature, although not always in the context of court-annexation. See, e.g., Bush, *supra* note 6, at 893 (past analyses have resolved the case-type question with one-step reasoning, i.e., where parties have a close and ongoing relationship, mediation should be used. Bush suggests a complex model for determining which case type for which resolution process); Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 777 (1985); McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981); D. PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (1986); Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987).

May the parties avoid mediation by unanimous consent? Alternatively, must one or more of the parties show "good cause" to avoid referral? What would "good cause" mean? What does compliance with referral entail? Is simple presence at a single session sufficient, or is meaningful participation required?

As a "designated outsider" to the mediation movement, I am singularly unable to answer these questions. More to the point, most judges and court administrators obviously labor under the same disability. By addressing these issues of central concern to the judicial system, mediation mavens would make a tremendous contribution. The following sections discuss my own views, suppositions, and questions regarding case selection.

A. *The Need for Case Classification*

The Florida mediation statute provides only that "a court may refer all or any portion of a contested civil action . . . to mediation."⁹ The statute is permissive, and it contains no guidelines to govern the referral of cases. The legislative intent appears to be to make mediation available, but not to require it in every case.¹⁰ The statute does require the Florida Supreme Court to adopt rules of implementation.¹¹

Pursuant to this legislative authority, the Florida Supreme Court has adopted interim rules that govern various aspects of court-annexed mediation.¹² The rules contain only one provision concerning case selection, and that deals with exclusions from mediation.¹³ No comparable provision exists governing the exercise of discretion to refer, although the rule does allow the chief judge in each circuit additionally to exclude from mediation "such other matters as may be specified . . ."¹⁴

This regime can only create a quandary for trial judges. They may (but need not) refer most (but not all) civil cases to mediation.¹⁵ Chief judges may preemptively exclude "other matters" from mediation, but the rule does not state whether this is to be done on a categorical or individual basis. Furthermore, apart from the designated exclusions, it appears from the rules that judicial referral makes mediation mandatory; mediation may be excused only upon motion,¹⁶ with sanctions available

9. FLA. STAT. § 44.302(1) (1987).

10. *Id.* This is apparent from the language "all or any portion," which obviously gives a court some measure of discretion.

11. FLA. STAT. § 44.306 (1987).

12. *In re: Proposed Rules for Implementation of Florida Statutes Sections 44.301-.306*, 518 So. 2d 908 (1987) (effective Jan. 1, 1988).

13. FLA. R. CIV. P. 1.710(b) (excluding a limited category of claims from mediation "except upon petition of all parties").

14. *Id.* at 1.710(b)(8).

15. "[T]he presiding judge may refer any contested civil matter or selected issues for assignment to mediation . . ." *Id.* at 1.700(a).

16. *Id.* at 1.700(c).

for noncompliance.¹⁷ Since the statute provides no mechanism for actually funding mediation programs, it recognizes that mediation may be a scarce resource that is not available in every case where it might be desirable.¹⁸

Thus, the decision to refer is necessarily a complex and important one. What cases are most appropriate for mediation? The following sections discuss two possible bases for referral: classification by case type and classification by case characteristics.

B. Referral by Case Types

Reference to case type provides the easiest resolution of the referral problem. Cases may be classified in a variety of ways, each of which results in a bright-line rule. Certainly, from the point of view of judicial efficiency, it makes the most sense for referral to mediation to be as nearly ministerial as possible.¹⁹

For example, a court might adopt a rule that refers cases on the basis of the underlying cause of action, such as torts or contracts. Similarly, referral might run according to subject matter or size of claim. Chief judges could adapt these or any number of other bright-line rules for circuit wide application, or individual judges could utilize them as selection devices. In fact, given the characteristic judicial emphasis on efficiency, it is entirely likely that the process of selection will fall by default into a rule of thumb procedure. That being the case, it would be extremely useful for mediation professionals to address the case type question.

It appears from the Florida Supreme Court's Interim Rules that mediation is at least contemplated for cases of all sizes. Special procedures are set forth for the mediation of small claims,²⁰ and separate sets of "Mediator Qualifications" are given for the lower civil court and the court of general jurisdiction.²¹ Regarding subject matter and causes of action, however, only "family and dissolution of marriage" cases are specifically mentioned in the rules.²²

One may extrapolate, therefore, that in the supreme court's judgment, domestic relations cases (given the appropriate mediator) are particularly suited to mediation. This, however, is a matter of some controversy. Several attorneys and women's advocates at the Florida workshop questioned the value of mediation in family matters. A frequent criticism of mediation is that the process may tend to perpetuate power imbalances

17. *Id.* at 1.720(b).

18. *See* FLA. STAT. § 44.302(1) (1987).

19. *See* Bush, *supra* note 6, at 942-62.

20. FLA. R. CIV. P. 1.750.

21. *Id.* at 1.760(a) and (c).

22. *Id.* at 1.760(b).

that might be more amenable to rectification in court.²³ In the family law setting, women might feel more acutely pressured to resolve differences informally, rather than to insist on an adjudication of rights. Finally, the spectre of domestic violence may, with or without the knowledge of the mediator, skew the process.²⁴

On the other hand, it is possible that family matters are the ideal subject for across-the-board mediation: the parties are involved in a continuing relationship. The needs of children may be more important than adherence to legal norms. Emotional considerations may predominate over financial ones. Finally, adversarial behavior might doom a potentially "successful" divorce.²⁵

These issues were discussed at the workshop only in the contexts of mediator training and the purpose (efficiency versus quality) of mediation. Should family mediators have to have degrees in social work? Should the ranks of family mediators be closed to lawyers?²⁶ Should family mediators be concerned with justice, or only with agreement?²⁷ In other words, the question of family mediation was mediator-centric. But the investigation should be deeper than that. In a system of court-compelled participation, judges need to know whether family matters, viewed as a case type, should be routinely, sparingly, or never referred. Because the supreme court rule seems to imply automatic mediation, a court-centered approach at the workshop—augmenting academic discussion with actual experience—was necessary either to validate or invalidate that assumption.

The same can be said of other case types as well. Even in the absence of mention in the interim rules, judges may be prone to refer all contract cases to mediation (because they involve relationships) or not to refer any tort cases (because they involve single events).²⁸ The reverse might

23. Delgado, *supra* note 2, at 1359; Rifkin, *Mediation from a Feminist Perspective: Promise and Problem*, 2 LAW & INEQUALITY 21 (1984).

24. See Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 61 (1984) (maintaining that mediation is not a desirable remedy for abuse cases).

25. See Silberman & Schepard, *supra* note 6, at 746-47 (stating that court-ordered mediation programs should encourage settlement of family disputes).

26. Cf. J. FOLBERG, DIVORCE MEDIATION—PROMISES AND PROBLEMS, (cited in S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 315 (1978)) (asserting that because family mediation crosses traditional professional boundaries these are questions about interdisciplinary cooperation and struggles for turf).

27. Cf. *id.* at 317 (stating that to insure fairness, current mediation practice is to urge or require that each divorcing party seek independent legal counsel to review the proposed agreement).

28. The pro-ADR literature generally stresses the importance of preserving relationships and structuring long-term solutions. Hence, single-event disputes may be seen as less amenable to mediation. See S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 92 (1978) (indicating that the process of mediation is said to improve the parties' capacity to resolve their future disputes); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 33 (1982) (mediation can help in creating, operating, or dissolving contract relationships).

also be true, and it is most likely that different judges will adopt different rules of thumb. Moreover, individual judges' referral standards probably will not be explicit; in the absence of clear rules or directives, they will more likely take the form of unarticulated inclinations.

All of this brings us back to the principal question: are some sorts of civil cases better suited to mediation than others? Only mediators have the answer, but judges are vitally in need of the information. If referrals ought to be made according to case type, then judges need specific guidance. If there is no basis for making subject matter referral, then judges need to be dissuaded from taking that route. In either case, the mediator-centered focus of the Florida workshop prevented the precise question from being addressed.

C. Referral By Case Characteristics

An alternative approach to across the board referrals would be consideration of individual cases. Are there identifiable characteristics that make certain cases more or less mediatable? Is it possible to create a checklist of factors for use by referring judges? Again, information along this line can only come from mediation professionals, and it is reasonable to assume that there exists some accumulated wisdom—even if it is only anecdotal—as to what makes a dispute amenable to mediation. I noticed at the Florida State workshop that mediators often traded this sort of information informally among themselves, but there was no attempt to organize the material into a format that could be used by referring judges.

Of course, the project of creating a taxonomy of mediatability is daunting. It may be beyond the competence of any single group of conferees, and the concept is no doubt controversial within the field of mediation itself.²⁹ Still, it seems intuitively preferable that judges pay some attention to the individual aspects of cases in making discretionary referrals. To do this they will need some guidance.

Perhaps lawsuits can be categorized according to their outcome potential. In the field of negotiation, it is recognized that some disputes are distributional while others are integrative.³⁰ That is, in some disputes there is a single sum to be divided between, or a single figure to be

29. See Brunet, *supra* note 8 (suggesting a two-tier process for judicial review); see also Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984).

30. H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 33 (1982); see R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 72-83 (1981); see also S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 28, at 19-21 (discussing the contentions of Raiffa and of Fisher and Ury).

determined by, the parties. These are zero-sum cases; what one party gains the other loses, and the style of bargaining involved is often termed purely distributional. Other disputes, however, hold the potential for more creative, win-win solutions. It may be possible for the parties to engage in a nondistributional process of value creation whereby all positions can be enhanced.³¹

In the world of lawsuits the relationship between the parties may determine the nature of the bargaining that takes place. Single-incident personal injury cases are usually regarded as lying on the distributional, or value-claiming, end of the continuum.³² The injured plaintiff is interested in maximizing recovery while the defendant (or, more realistically, the defendant's insurer) desires to defeat the claim or at least to keep the judgment low. Although it has been suggested that some personal injury plaintiffs have a nondistributional interest in apologies or other recognition of the harm done,³³ it is generally understood that the bottom line is the only relevant consideration.³⁴

At the other end of the spectrum, long term contract cases are usually seen as exemplifying the potential for a win-win solution.³⁵ Where the parties have an interest in their continuing relationship, they may be willing and eager to compromise short-term distributional advantage in favor of long-term cooperation.³⁶

Alternatively, cases may be divided not according to the relationship between the parties, but by the nature of the underlying disagreements themselves.³⁷ It occurs to me that we might characterize lawsuits as either simple disputes or principled conflicts. Simple disputes are in the nature of contests. There is a stake to be divided, or entitlements to be allocated, but there is no deep, or deeply held, principle to be vindicated. That is, the parties are in disagreement only over the outcome of the lawsuit. Thus, examples of simple disputes would include many

31. *Id.* See also Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, AM. B. FOUND. RESEARCH J. 905 (1983).

32. *Id.*

33. Menkel-Meadow, *supra* note 5, at 783-89.

34. It is occasionally suggested that structured settlements can provide a win-win alternative in some personal injury cases. Economists will explain, however, that payouts over time really only vary the ultimate amount of the settlement, making it cheaper for the defendant and less valuable to the plaintiff. Though a structured settlement may be more acceptable to the parties, it is still the distribution of a quantifiable sum. McEwen & Maiman, *supra* note 8, at 250 (empirical data showing that traffic accident cases have lowest settlement rate among mediated cases probably due to the different and conflicting versions of fact, accompanied by hard feelings between the parties).

35. Riskin, *supra* note 28, at 33.

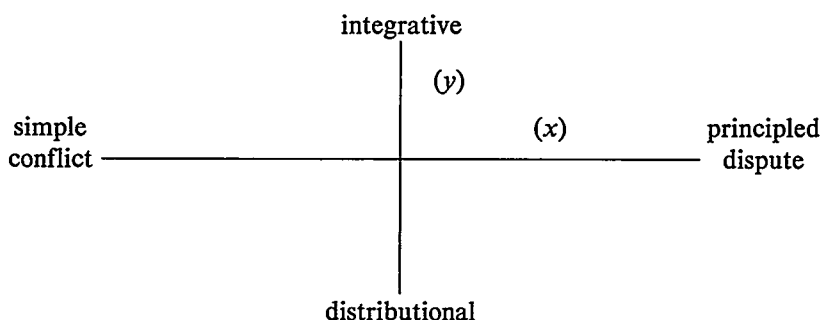
36. *Id.*

37. McEwen & Maiman, *supra* note 8, at 250 (stating that "success rates vary somewhat according to the nature of the case.").

warranty complaints,³⁸ many property damage cases,³⁹ and many contract claims.⁴⁰ Typically, resolution of the lawsuit can be expected to resolve the disagreement in a simple dispute.

Disagreements on matters of principle, however, underlie some lawsuits. These can be called "principled conflicts" because the parties are at issue over something that runs deeper than the outcome of the case. Employment discrimination, civil rights, public safety, and class action cases may all provide examples of such conflicts over nonliquid claims. The parties are interested in the resolution of the matter, but they are equally, if not more, concerned about validation and vindication. Thus, the resolution of the lawsuit, particularly by settlement, does not necessarily resolve the conflict.⁴¹

Assuming that the above examples can be used to locate endpoints, there is obviously a range of cases that fall somewhere along the axes of conflict/dispute and distribution/integration classifications. That universe is easily represented by the following figure, where the *x*-axis represents the type of dispute and the *y*-axis represents the outcome potential.



My intuition is that conflicts are less amenable to mediation than are disputes, and that distributive cases are less mediatable than are integrative cases. If that is reasonably accurate, then matters with high positive *x* and *y* values will be the best candidates for referral to mediation. Conversely, cases with low or negative *x* and *y* values should probably remain in ordinary litigation.

38. The failure of a product to function properly, particularly where neither safety nor injury are involved, would be a simple dispute. Repair, replace, or make compensation for the defect—whether in an automobile or a supertanker—and the dispute ends.

39. Absent the possibility of recurring harm, monetary compensation for lost or damaged property would seem to vindicate every plaintiff's interests.

40. Nonperformance, particularly in the case of asserted negligence or inadvertence, is often a question of fact. Did it happen? Or why did it happen? Once those questions are resolved the lawsuit is often resolved.

41. See Fiss, *supra* note 1, at 1075; Terrell, *supra* note 1, at 545-52.

My suppositions, of course, have never been validated. Knowledgeable mediators may have information to the contrary. Moreover, even assuming the general accuracy of my characterizations, a system for assigning weights and values to individual cases remains to be developed. It seems fairly certain, however, that in most cases a disagreement can be located on either axis only by consideration of its individual characteristics. To determine the "outcome potential" of any particular case will require information about the underlying facts and knowledge of the relationship between the parties.

Why is this relevant to mediation referral? It has been suggested that mediation is much akin to integrative bargaining,⁴² and that the skills of a mediator are similar to those of a "wise negotiator."⁴³ If that is truly the case, then judges must be informed that the characteristics of a case may affect its mediatability. Moreover, and with more difficulty, it will be necessary to locate a breaking point on some continuum for the purpose of referral.

IV. MEDIATOR TRAINING AND QUALIFICATION

In contrast to the question of case selection, the Florida workshop devoted substantial time and energy to the issue of mediator training and qualification. This, of course, was to be expected, given the centrality of the individual mediator to the entire process of court annexation. As I will develop below, the *weltanschauung* of most attendees seemed strongly to favor training and to oppose other forms of qualification.

A. *Qualification According to the Florida Supreme Court*

The Florida code requires the chief judge of each judicial circuit to "maintain a list of mediators who may be appointed to carry out the provisions" of the mediation statute.⁴⁴ The supreme court is to establish overall standards for eligibility and qualification.⁴⁵ In accord with its statutory responsibility, the Supreme Court of Florida adopted interim rules on mediator qualifications and training programs that provided the backdrop for the discussion of the issue at the Florida workshop.⁴⁶

The supreme court rules divide mediations into three categories and set separate qualifications for each. To receive referrals from the county courts, which have limited jurisdiction up to \$5,000, a mediator need

42. See generally S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 28.

43. R. FISHER & W. URY, *supra* note 30; Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 UCLA L. REV. 863, 897-920 (1987).

44. FLA. STAT. § 44.302(3).

45. *Id.*

46. FLA. R. CIV. P. 1.760 and 1.770.

only have had twenty hours of certified training and must have engaged in a variety of specified observations and actual mediations. There are no other "professional" qualifications.⁴⁷ In contrast, for the circuit court, which has unlimited jurisdiction, mediators must be either members of the Florida bar or retired judges from other jurisdictions, and must have received forty hours of mediation training. There is, however, no requirement of mediation experience or observation for circuit court mediators.⁴⁸ Finally, family mediators are restricted to lawyers, psychiatrists, certified public accountants, and the holders of masters degrees in certain fields.⁴⁹ Additionally, family mediators must have practiced their underlying professions for at least four years, and, except for those who hold master's degrees in family mediation, must complete a forty-hour training program.⁵⁰ Again, it is not required that the individual either have observed or conducted an actual mediation.⁵¹

All of this adds up to an interesting pastiche. More serious cases appear to require greater, or at least more numerous, qualifications, but only mediators in the smallest cases are required even to have seen—much less to have participated in or conducted—an actual mediation prior to certification. Moreover, certified public accountants may mediate family cases, but not other civil matters involving more than \$5,000, and the same holds true for attorneys from jurisdictions other than Florida.

The rule places great stock in professional certification. Other than in very small disputes, mediators must be licensed to practice another profession. This bias also has implications for the prescribed training regimen. A separate rule sets out the requirements for the various levels of certification. County court mediators must receive twenty hours of training consisting of written and oral communication, mediation theory, the mediation process, standards of conduct, conflict management, the court process, and community resources.⁵² On the other hand, circuit court mediators (who must all be either practicing lawyers or former judges), must have forty hours of training, but they are not required to study either the court process or written and oral communication.⁵³ Presumably, the Florida Supreme Court believed that it would be

47. FLA. R. CIV. P. 1.760(a).

48. FLA. R. CIV. P. 1.760(c).

49. FLA. R. CIV. P. 1.760(b)(1). The precise language of the Rule provides that a mediator of family and dissolution of marriage issues must "have a Masters Degree in social work, mental health, behavioral or social sciences; or be a physician certified to practice adult or child psychiatry; or be an attorney or a Certified Public Accountant licensed to practice in any United States jurisdiction"

50. FLA. R. CIV. P. 1.760(b)(2) and (3).

51. *Cf.* FLA. R. CIV. P. 1.760(a).

52. FLA. R. CIV. P. 1.770(c).

53. FLA. R. CIV. P. 1.770(a).

redundant to train lawyers and judges in these matters, but the result is that circuit court mediators must spend twice as many hours being trained in fewer subject areas. Finally, family mediators, who must have forty hours of training, are required to have the same training as county court mediators, and they are additionally required to cover psychological issues and family dynamics, the needs of children, family law including asset evaluation, and family economics.⁵⁴ The rule does not suggest what subjects ought to be deleted from the forty hours in order to make room for the additional "family" subjects.

Thus, lawyers who wish to mediate family cases must study both the court process and family law, but no comparable training is necessary for the largest of civil cases. The law degree suffices; personal injury lawyers may mediate probate cases and criminal defense lawyers may mediate securities matters.

It may be that these erratic training provisions will work well in practice, and it may be that Florida's reliance on law degrees and professional licensing is justified. Whatever the results, however, the qualification provisions of the supreme court rules seem almost calculated to ruffle the feathers of professional mediators. The rules contain no recognition of mediation as even a nascent profession, and they contain no provision for the advancement of nonlawyer mediators. Compounded by the rules' internal inconsistency regarding training, it is no wonder that even the lawyer-mediators at the Florida workshop devoted considerable time and energy to revisiting the question of qualification.

B. *Qualification According to the Mediators*

Perhaps in reaction to the Florida Supreme Court Rules, and perhaps simply as another manifestation of mediator-centrism, the Florida conferees spent what I considered to be an inordinate amount of time discussing mediator qualifications.⁵⁵

Predictably, most ire was drawn by the "professional credential" requirements. A frequently expressed view was that mediation is a skill that stands completely separate and apart from other professional training and abilities. Lawyer and nonlawyer mediators alike affirmed that the ability to bring parties into agreement does not depend on having

54. FLA. R. Civ. P. 1.770(b).

55. The question of who should mediate is frequently raised in mediation literature. See, e.g., Pipkin & Rifkin, *The Social Organization in Alternative Dispute Resolution: Implications for Professionalization of Mediation*, 9 JUST. SYS. J. 204, 225 (1984) (suggesting dividing cases by degrees of complexity; those requiring greater expertise going to professional mediators, minor disputes going to lay mediators in public agencies); Riskin, *supra* note 28, at 29; Rich, *The Role of Lawyers: Beyond Advocacy*, 1980 B.Y.U. L. REV. 767; Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

completed an academic course of study, and a commonly asserted theme was that "bus drivers might make the best mediators."⁵⁶

No person, at least in the discussion groups that I observed, consistently maintained that lawyers or other professionals might have an advantage in conducting mediations.⁵⁷ The nearest that any group approached such a concession was to allow that judges would be hesitant to refer cases to nonlawyers. To the observer, it was difficult to determine how much of this reaction was attributable to "turf" protection, what portion was based upon the counter-culture of alternative dispute resolution, and how much derived from principle. It is imperative, however, to explore the potential bases for both the supreme court rule and the mediators' response.

What harm might ensue from limiting court-annexed, mandatory mediation to professionals? First, good mediators might be excluded. Second, bad mediators might be engaged. From a systemic perspective, the first problem is obviously the lesser of the two. Excluding some good mediators need not be a long-term social harm, so long as other good mediators take their places. From a societal point of view, then, individual exclusions would not seem to provide a principled basis for objecting to the certification requirements.⁵⁸

To be sure, individual mediators may be aggrieved by the supreme court's educational requirements. It is no doubt a serious personal harm for a capable individual to be precluded from or limited in the practice of mediation.⁵⁹ Still, an assessment of the possible justification for such harm rests upon an evaluation of the substitutes. In this regard we need to ask, do lawyers make good, bad, or indifferent mediators?⁶⁰

In this sense, lawyers may be a threat to mediators, or at least to those who seek to develop an independent profession. Many mediators,

56. See Stulberg, *supra* note 55, at 94-97 (listing numerous interpersonal qualities and abilities a mediator should possess); Greason, *supra* note 7.

57. Cf. Pipkin & Rifkin, *supra* note 55, at 225 (data from empirical studies indicating that participants in the ADR movement are substantially professionalized); Stulberg, *supra* note 55, at 94 (professional standing is one of the desirable qualities for mediators).

58. Ray Shonholtz, one of the principal speakers at the Florida State workshop, pointed out that the supreme court's education requirements could have the effect of excluding minorities from the ranks of mediators. If this assumption is correct, then the certification requirements will result in systemic harm. To assess the depth of this problem more questions need to be answered: are there currently (or potentially) significant numbers of minority mediators? Does the proportion of minorities active in mediation greatly exceed the proportion of minorities who practice law (or accounting or social work)? Is there a value to substituting lawyers for nonlawyers that outweighs the need for enhanced minority participation?

59. See *supra* note 47 and accompanying text.

60. Current mediation literature frequently calls for lawyer involvement in mediation. The literature suggests that lawyers serve as mediators or at the very least refer their clients to mediation and serve in an advisory role. See, e.g., Riskin, *supra* note 28; Rich, *supra* note 55; S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 28.

however, appear to see the problem more broadly, implying, when not directly stating, that the involvement of attorneys is bad for the entire mediation process.⁶¹

A constant presence at the Florida workshop was what I shall characterize as "The Myth of the Milking Lawyer." This image, almost Dickensian in its provenance, caricatures lawyers as constantly being up to no good. Lawyers interfere with mediation. Lawyers only care about their fees. Lawyers push their clients around. Lawyers only care about their fees. Lawyers want to control mediation. Lawyers only care about their fees. Lawyers do not know what is good for their clients. Lawyers only care about their fees.⁶²

These views, although not universal, were frequently expressed and seldom challenged in the various workshop sessions. It was seriously suggested by one of the "break-up" groups that mediators should be given the power completely to exclude attorneys from mediations.⁶³ Another group urged that informing the parties of the right to counsel ought not be included in mediation guidelines, and that the burden should be placed on the parties to know that they could be represented in the proceeding. Neither group addressed the anomaly of diminishing the role of counsel in a mandatory, court-annexed process. Nor did they recognize the implications of such rules for institutional or corporate parties.

There was little discussion of the contributions that counsel might make either to mediation in particular or to dispute resolution in general.⁶⁴ Rather, the tendency was to regard attorneys as, at best, an impediment to be overcome. In this vein questions arose such as "How to get lawyers to allow their clients to mediate?"

The truest believers tended to divide the world between attorneys and mediators, and to place all virtue on a single side of the divide. Thus, a common assumption was that mediation, because it may provide an early resolution, threatens lawyers by diminishing their fees. The unarticulated result of this attitude is the further assumption that lawyers' cooperation can only be achieved through stealth or superior power. It

61. See Pipkin & Rifkin, *supra* note 55, at 222-25 (discussing that involvement of lawyers and other professionals may greatly increase costs of mediation).

62. See Rich, *supra* note 55, at 775 (lawyers are criticized for getting carried away with their advocacy role); Riskin, *supra* note 28, at 48 n.119 (stating that "[m]any lawyers, if they thought about it, would see mediation as an economic threat.").

63. See O. J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT* 75 (1978) (stating that lawyers are not well-equipped to handle problems involving interpersonal conflict because of their lack of training in the behavioral sciences).

64. Cf. Rich, *supra* note 55, at 775 (listing several specific reasons why lawyers are best suited to handle dispute resolution, e.g., complex tax issues); Riskin, *supra* note 28; *Professional Responsibility Problems of Divorce Mediation*, 7 FAM. L. REP. (BNA) 4001, 4003 (1981) (asserting that nonlawyer mediators run some risk of engaging in the unauthorized practice of law).

fell to me to suggest that the cooperation of the bar might better be assured through education; that attorneys might willingly embrace mediation if the process can be shown to be of benefit to their clients.

All of this speaks primarily to lawyers in their role as advocates. There was more sympathy for the pre-existing lawyer mediators, perhaps because those in attendance largely eschewed the practice of law. Still, if it was accepted grudgingly that lawyers would be involved in mediation as lawyers, it was hardly accepted at all that they might have an advantage as mediators. It is not surprising that there was little discussion of the topic to which I will turn next—the possible special value of legal education in the process of mediation.

C. The Problem of the "Complex" Civil Case

The single concession that the Florida conferees generally made to the legal profession was that lawyer-mediators just might be called for in complex civil cases. The conferees pointedly did not concede that lawyers would be more able to mediate these matters, but only that they would have greater credibility with heavily invested litigants. That is, parties and judges can be expected, albeit mistakenly, to prefer to entrust mediation to lawyers in the largest and most complicated cases. The mediators were, by and large, willing to yield on this point in order to preserve their own credibility, not as a matter of conviction. It remained an article of faith that any person, properly trained, can mediate any dispute, and that individual exceptions are subject more to temperament than to professional background.

I have insufficient experience with the process of mediation to quarrel with the concept of pan-mediatability. I must express some skepticism, however, with the position that legal training is irrelevant to the endeavor of helping parties reach agreement within a judicial context. This last point was seemingly lost on the conferees: court-annexed mediation is part of the judicial process, and disputes typically do not reach that point unless some preliminary efforts at resolution have failed.⁶⁵ Moreover, the judicial setting brings with it certain rules, conventions, limitations, and requirements which, like it or not, must at least be considered by the mediator. Thus, the appropriate question is not whether expediency demands some cession to the legal profession, but rather whether mediation of litigated disputes differs sufficiently from other mediations as to require an attorney in the mediator's seat.

The principal distinguishing features of Florida's mediation scheme, in addition to court-annexation itself, are (1) mandatory referral, and

65. See Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 32-34 (1984).

(2) enforceability of mediated agreements. As noted earlier, parties may be compelled to participate in mediation,⁶⁶ and failure to comply may result in sanctions.⁶⁷ Furthermore, a mediator's "report on agreement"⁶⁸ may become "binding upon the parties"⁶⁹ and apparently enforceable in the same manner as any other civil judgment.⁷⁰ That parties are acting under compulsion and are potentially subject to severe consequences surely differentiates the Florida program from what might be termed "purely voluntary" mediation. And while the ability to facilitate discussion or agreement may be the *sine qua non* of the successful voluntary mediator, it is certain that other issues will arise in situations involving mandatory, enforceable, court-annexed mediation.

Thus, even assuming the internal validity of the theory of universal mediatability, it is necessary to address the legal issues external to mediation that arise in the case of judicial referral. What follows is a partial list of such issues as they arise in civil litigation, with some emphasis on the value of legal training to their consideration.

First, it would seem that a mediator ought to know exactly what is at stake in any court referred matter. Such consideration necessarily extends beyond the parties' conception of the issues, to reach all reasonably foreseeable legal consequences. This concept of looking beyond the parties' own understanding should be familiar to mediators since it is analogous to the mediator's search for unrecognized, win-win solutions. Litigation, however, places limits on, and attaches consequences to, even mediated outcomes. As a result, even the best nonlawyer mediator could conceivably facilitate a superficially acceptable agreement that actually falls short of or thwarts the parties' interests or goals.

Closely related is the problem of completeness or finality. Many cases involve multiple issues, and generally there is no catalogue available that sets them out with precision. Often a single issue will predominate, while numerous sub-issues remain unarticulated or unrecognized. Significantly, this likelihood is probably greatest in the "relational" cases, which many believe are the most suitable for mediation.⁷¹ Overlooking sub-issues may frustrate the parties' needs, as noted above, but the more serious consequence is that their omission may render an agreement either legally avoidable or ineffective as a matter of law. That is, in the absence of a comprehensive resolution, the parties may find themselves without a truly final agreement. Alternatively, the result may be that one party is able to walk away from the settlement leaving the other without recourse.

66. FLA. R. CIV. P. 1.700.

67. FLA. R. CIV. P. 1.720(b).

68. FLA. R. CIV. P. 1.730(b).

69. FLA. R. CIV. P. 1.730(c).

70. FLA. R. CIV. P. 1.730(d).

71. See *supra* notes 32-34 and accompanying text.

This, in turn, raises the question of collateral consequences. An agreement that is comprehensive, final, and binding, may nonetheless give rise to harsh, unanticipated consequences. Presumably, a mediator would want to alert the parties to such consequences, but a nonlawyer might lack the information to do so.

Finally, we must consider the scope of available relief. Mediators pride themselves on being able to help fashion flexible agreements that do not necessarily take the law's prescriptions into account. This pride is appropriate, since often there may be no reason to compel private parties to conform their agreements to a particular legal rule.⁷² In this vein, the law is viewed as a remedy of default, to be applied only as a second-best alternative where private agreement has failed. Even setting aside the counterargument that legal rules embody democratically determined limits and norms, it should be apparent that courts cannot be free to enforce (or even endorse) extra-legal or ultra vires remedies simply because parties have agreed to them. Law may not bind the parties, but it surely must bind the court. Thus, court-annexed mediators must be sensitive both to the legality of the results that they achieve and the availability of the relief that they fashion.

In abbreviated form, that is the case for using lawyer-mediators in court-annexed mediation. Lawyer-mediators are more likely to know what needs to be known in order to assist the parties in reaching an intelligent agreement. Interestingly, many of the concerns that I have noted apply to all civil cases, and not only "complex" ones, although the considerations will obviously multiply as complexity increases.

In reply, it must be said that vigilant counsel, assuming that they are not excluded by the mediator, and reviewing judges should be able to correct any errors or omissions made by the mediator. For example, the Florida Supreme Court Rules provide explicit mechanisms for attorney and judicial review.⁷³ The rules specifically require that a judge review every agreement to "determine whether the terms are lawful, within the jurisdiction of the court, and, where court approval is required by law, in the best interests of all parties concerned, including minor children where appropriate."⁷⁴

Nonetheless, lacunae remain. Even under the Florida Supreme Court rule the trial judge is not required to examine an agreement for completeness or for the possibility of collateral consequences. Perhaps counsel will perform this role, rejecting settlements on the basis of loopholes or undesirable ramifications. Of course, that would only reinforce the mediators' charge that attorneys' involvement impedes agreement. More to the point, clients, especially vulnerable ones, may be unwilling to

72. For arguments to the contrary, see Fiss, *supra* note 1; Terrell, *supra* note 1.

73. FLA. R. CIV. P. 1.730(b) and (c).

74. FLA. R. CIV. P. 1.730(b).

abandon mediator-approved agreements even where the terms are incomplete or the results are unforeseeable. We must also allow for the likelihood that judges and attorneys will rubber-stamp or perfunctorily review mediated agreements, either out of respect for the mediators or because of the press of other business.

Finally, where the parties are all represented, let us assume that judges and counsel will provide sufficient review. In those cases where the nonlawyer mediator's errors are discovered the entire process will have been for naught. It does the parties little good to have engaged in a potentially lengthy and taxing mediation only to discover that the results must be rejected by counsel or cannot be adopted by the court. Such a turn of events would be inefficient, time consuming, costly, and frustrating: the very opposite of the announced goals of the ADR movement. Certainly that would do nothing to justify the institution of mandatory, court-annexed mediation.

This is as far as supposition can take us. We are left with the question with which we began: might lawyers, sometimes or always, be necessary or desirable as mediators? While I have outlined the circumstances under which lawyers presumably would be preferred, others could no doubt point out situations in which a law degree could be detrimental. The answer to the query is neither self-evident nor inexorable. Unfortunately, the Florida conferees were in the main unwilling even to address this possibility, and therefore they failed to comprehend these three truths: first, court-annexed mediation is a special case, and verities that apply in other contexts must at least be re-examined; second, in a contest between mediators and lawyers, where the judicial system is the arena, the lawyers will always win; and, third, when considering dispute resolution the focus should always be on the parties' needs, never on the professionals' interests.

V. CONCLUSION

If the purpose of the ADR movement is to de-emphasize conflict and litigation, and to make a greater reality of citizen-empowered and cooperative dispute resolution, then the Florida experiment with court-annexed mediation can only be seen as a victory. For the first time the civil justice system of an entire state has embraced ADR as a legitimate and necessary component of civil litigation. As with many popular movements, however, institutional success is potentially transformative. Court annexation of mediation may mean abandonment of the ADR counter-culture, and it certainly requires an end to mediator-centrism. In a mandatory system the individual mediator can no longer be regarded as a lone problem-solver, but must come to be seen as a player in a much larger system. A review of some ADR literature, and the expressed

views of the Florida conferees, however, combine to suggest that the ADR movement may not yet be quite ready for that level of success.